No. 80-6045

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Office-Supreme Court, U.S.
FILED
MAY 4 1981
ALEXANDER L. STEVAS,
CLERK

RUBIN KREMER,

Petitioner,

-against-

CHEMICAL CONSTRUCTION CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner submits this supplemental brief to bring to the Court's attention the recent per curiam opinion of the United States Court of Appeals for the Second Circuit in Ottaviani v. State University of New York, No. 80-7601 (2d Cir., April 29, 1981). A copy of the opinion is appended hereto.

The Ottaviani case involves essentially the same issue presented by the Petition in this action. In affirming the district court's dismissal of the plaintiff's Title VII action, the panel in Ottaviani "fe[lt] compelled to follow" the Second Circuit's opinion in Petitioner's case and in Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir.) (per curiam), cert. denied, 444 U.S. 983 (1979), the

authority relied on by the Second Circuit in affirming dismissal of Petitioner's action (see Pet. at 5-7).

As noted in the Petition, the Second Circuit's decisions in this case and in Sinicropi conflict with post-Sinicropi decisions in at least two other circuits and the Second Circuit's reasoning in those decisions has been rejected by four other circuits and at least eight district courts. (Pet. at 8-9). The Ottaviani court acknowledged this conflict, observing that

> "We realize that there is a split in authority in the circuits, . . . but we feel compelled to follow our own precedents." (Slip op. at 2749)

Ottaviani thus underscores the need for this Court to grant the Petition to resolve a conflict among the circuits on a critical question under Title VII, and further illustrates the frequency with which this important issue arises.

May 1, 1981

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 985—September Term, 1980

(Argued April 9, 1981 Decided April 16, 1981*)
(Opinion filed April 29, 1981)

Docket No. 80-7601

ROBERTA OTTAVIANI, Individually and on behalf of all other persons similarly situated,

Plaintiff,

—and—

ELINOR BOICE,

Intervenor-Plaintiff-Appellant,

—against—

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ and CLINTON R. WHARTON, JR., in his capacity as Chancellor of the State University of New York,

Defendants-Appellees.

* This appeal was originally heard on April 9, 1981 and was decided by order, dated April 16, 1981. Such a summary disposition has no precedential value under our Local Rule § 0.23. However, counsel in the *Kremer* case referred to in the text of this opinion has informed us that he wishes to quote from the April 16 order in connection with a petition for certiorari in that case. Accordingly, we repeat the substance of our April 16 order in this per curiam opinion, which will be published.

Before:

FEINBERG, *Chief Judge,*
LUMBARD and VAN GRAAFEILAND, *Circuit Judges.*

Appeal from judgment of the United States District Court for the Southern District of New York, Mary Johnson Lowe, J., denying appellant intervention as party plaintiff.
Judgment affirmed.

CAROLINE V. RIDER, Weiner & Rider, Red Hook, NY, *for Plaintiff-Appellant.*

PATRICIA C. ARMSTRONG, New York, NY, Assistant Attorney General of the State of New York (Robert Abrams, Attorney General of the State of New York, George D. Zuckerman, Assistant Solicitor General of the State of New York, of Counsel), *for Defendants-Appellees.*

PER CURIAM:

Plaintiff-intervenor Elinor Boice appeals from an order of the United States District Court for the Southern District of New York, Mary Johnson Lowe, J., granting the motion of defendant-appellee State University of New York at New Paltz (SUNY) to reconsider and vacate an earlier motion allowing appellant Boice to intervene as a party plaintiff in the class action suit of Ottaviani v. SUNY. In granting

defendant's motion, Judge Lowe stated that the district court was bound by the opinion of this court in Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir.) (per curiam), cert. denied, 444 U.S. 983 (1979). We agree that that decision and our more recent opinion in Kremer v. Chemical Construction Corp., 623 F.2d 786 (2d Cir. 1980), require the result reached by the district court. We realize that there is a split in authority in the circuits, ably brought to our attention by appellant's counsel, but we feel compelled to follow our own precedents.

The judgment of the district court is affirmed.